No. 4634

United States Circuit Court of Appeals

For the Ninth Circuit

T. H. JOHNSON,

Appellant,

vs.

MATT STARWICH, as Sheriff of King County, State of Washington,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLEE

PATTERSON & ROSS,
Attorneys for Appellee.
806 Dexter Horton Building,
Seattle, Washington.

RAINIER PRINTING COMPANY, SEATTLE

No. 4634

United States Circuit Court of Appeals

For the Ninth Circuit

T. H. JOHNSON,

Appellant,

vs.

MATT STARWICH, as Sheriff of King County, State of Washington,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLEE

ARGUMENT.

As we understand the position of the appellant it is that—

1. Revised Statute, Sec. 5270, insofar as that

section undertakes to confer upon judges of State Courts power to entertain complaints in international extradition proceedings, is unconstitutional.

2. That if Congress does have the power to give such authority to state judges, the warrant of arrest in such cases shall be issued by the state judge to run in the name of the President of the United States for the reason that the state judge is acting as a Federal judicial official and that his process so issued is Federal process.

The question raised by the Appellant is an interesting one, but not entirely novel. It is true that extradition from the United States to other countries is controlled exclusively by the Federal Government and the case cited by Appellant (Appellant's Brief, p. 5), *Holms vs. Jennison,* 10 Law Ed. p. 579, so holds. This was a case where the governor of Vermont undertook to issue a warrant directing the sheriff of a county to deliver the prisoner to the Canadian agent to be taken to Canada. The granting of the extradition warrant for the purpose of actually removing the accused to the foreign jurisdiction is exclusively within the jurisdiction of the executive branch of the United States Government. In the case at bar, however, no such question is raised. Here the proceeding before Judge Gilliam

was merely to determine whether there was sufficient evidence to hold the accused pending the action of the Executive Department, not a proceeding for the extradition of the accused.

Appellant argues at great length to the point that the function exercised by the extradition magistrate (in this case Judge Gilliam, a State Judge) is the exercise of judicial power. It is unnecessary for the Appellant to so argue, for undoubtedly, when a state judge acts as a magistrate in an extradition proceeding, he is first called upon to determine whether or not the complaint made under oath before him is sufficient upon which to base his warrant, and later is called upon to hear evidence and decide whether or not such evidence is sufficient to sustain the charge and sufficient to place the accused upon trial had the crime with which he is charged been committed in the jurisdiction of the magistrate. Concededly, in such cases, the magistrate is acting in a judicial capacity and exercising a judicial function, but, and this is the point, he is not exercising a part of the "judicial power" of the United States, as that is used in the Constitution.

"Judicial power" is defined in Sec. 2 of Art. 3 of the Constitution as extending "to all Cases, in Law and Equity, arising under this Constitution, the

Laws of the United States, and Treaties made, or which shall be made, under their Authority."

Chisholm vs. Georgia, 1 Law. Ed. 440, p. 464.

The proposition contended for by the Appellant, namely, that Congress has not power to confer judicial powers upon state judges and magistrates, is first found enunciated by Justice Storey in *Martin vs. Hunter,* 4 Law Ed. 97, cited by Appellant, in an observation to the effect that "Congress can vest no portion of the judicial power of the United States except in courts ordained and established by itself." This doctrine was apparently repeated in several subsequent decisions of the United States Supreme Court and was followed by some of the state courts, but all of the decisions, which seem by their language to support the proposition of the Appellant, will be found to be cases where penalties were sought to be enforced.

However, the right of Congress, as a means of accomplishing a thing clearly within the scope of its legitimate powers, to enact laws conferring powers judicial in their nature upon state magistrates, has been recognized by every department of the government practically since the adoption of the Constitution.

It has been held that authority given to justices

of the peace and other state officers to arrest and commit for a violation of the criminal law of the United States, is no part of the "judicial power" within the meaning of that term in the Third Article of the Constitution.

Ex parti Gist, 26 Ala. 156-163;
Prigg vs. Penn., 10 Law Ed. 1060;
Moore vs. Illinois, 14 Law Ed. 306;
In re Kaine, 14 Law Ed. 345;
Robertson vs. Baldwin, 41 Law Ed. 715;
Levin vs. U. S., 128 Fed. 826.

The case of *Robertson vs. Baldwin,* 41 Law Ed. 715, 165 U. S. 275, cited above, clearly points out the distinction between "judicial power" as used in the Constitution and the judicial power and the exercise of judicial function by state magistrates under Federal statutes.

A justice of the peace in Oregon issued a warrant for the arrest of deserting seamen and committed them to jail, under a Federal statute which provided that a justice of the peace might, upon the complaint of the master of the vessel, issue a warrant to apprehend a deserting seaman and bring him before the justice to hear testimony as to whether or not the seaman had deserted, and if the justice so found, to commit the deserter to the county jail of

the said town or place until his vessel be ready to proceed. It was in this case contended that Congress had no authority to vest judicial power in the courts or judicial officers of the several states, and the court held that the power given to justices of the peace to arrest deserting seamen is not within the term "judicial power" as used in the Constitution, and yet, clearly, the justice of the peace under such circumstances was acting in a judicial capacity.

The second point made by the Appellant, namely, that if the state judge has a right to act as an extradition magistrate, he is acting as a Federal judicial officer and should issue Federal process running in the name of the United States and directed to the United States marshal for service, is without merit.

The state judge, acting as extradition magistrate, is not a judge or officer of the United States. He is a judge or officer of the state and is permitted by the state to aid the Federal Government in securing offenders against the laws of other countries so that they may be held for the Executive Department of the United States to carry out the treaty obligations of the Federal Government. This is pointed out clearly in *Ex parte Gist,* 26 Ala. 156-164, cited above.

The purpose in conferring this power upon state magistrates is to make available in extradition cases the entire machinery of both the state and Federal Governments in carrying out our treaty obligations, and Sec. 5270 R. S., provides that whenever complaint under oath shall be made before one of the judges therein mentioned, he shall issue "his warrant."

In the case now before the court, Mitchell Gilliam, a State Judge, was voluntarily assisting the Federal Government and in doing so he issued "his warrant," the only warrant which he has the power, by virtue of his office, to issue, namely, one running in the name of the State of Washington, and properly directed to the Sheriff of the County where the accused might be found.

Respectfully submitted,

PATTERSON & ROSS,

Attorneys for Appellee.